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Summary of In re Estate of Bethurem, 129 Nev. Adv. Op. 92

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WILLS & ESTATES: UNDUE INFLUENCE

Summary

The Court determined one issue: (1) whether, in the absence of a presumption of undue influence, a will contestant bears the burden of proving undue influence by a preponderance of the evidence.

Disposition

Yes, absent a presumption of undue influence, a will contestant bears the burden of proving undue influence by a preponderance of the evidence.

Factual and Procedural History

Respondents Anita Herrera Perez (“Anita”) and Sandra Kurtz (“Sandra”) challenged the validity of their stepfather’s will, claiming undue influence from appellant, their Aunt Ines Careveo (“Ines”). In 2004, respondents’ stepfather, Arlan Bethurem (“Arlan”), executed a will bequeathing his estate to his wife Bertha. If Bertha did not survive him, Arlan’s will divided his estate equally between his three stepchildren and a granddaughter. In 2005, Bertha became ill and Arlan needed assistance with her care. Ines came from Texas to help care for Bertha. Ines asked Sandra and Anita to assist with Bertha’s care, but neither could do so. Ines was angry with Sandra and Anita for failing to care for Bertha.

Bertha passed away in May 2006. Ines helped Arlan to make funeral arrangements with a priest. The priest testified that Arlan was lucid at the meeting, but expressed disappointment in Sandra and Anita for not being more supportive during Bertha’s illness. After the funeral, Arlan spoke with Ines daily via telephone. However, Arlan did not speak with Sandra for several months or to Anita for more than a year. In the meantime, Arlan continued to go to work and to provide for his own daily needs.

In 2007, Arlan had his friend and accountant Vicki Preston (“Preston”) prepare a new will for him, which changed the beneficiaries to Ines and Arlan’s sister and disinherited his stepchildren. Preston testified that Arlan appeared in good mental condition. Further, Preston and her friend, who served as a witness to the will, testified that Arlan expressed disappointment that Sandra and Anita had not helped care for Bertha. Arlan also conveyed title of his home to himself and Ines as joint tenants with right of survivorship. Additionally, he added Ines to some of his bank accounts.

Arlan lost his job in October 2008. He put his house up for sale and moved to Oregon to be with Sandra. Arlan expressed regret to Sandra about changing his will. Sandra testified that Arlan had a history of changing his will when he was angry with family members. Arlan named Sandra and Ines as beneficiaries to a savings account worth \$84,000.

Two months later, Arlan committed suicide. Preston was appointed special administrator of Arlan’s estate. Because Arlan’s home was in escrow at the time, Ines received the sale proceeds. Ines and Sandra received equal shares of his \$84,000 savings account. Preston

¹ By Erica C. Smit

petitioned to distribute the rest of the according to the 2007 will. Sandra and Anita opposed the petition, claiming Ines had unduly influenced Arlan.

The probate commissioner recommended that the 2004 will be admitted for probate, finding that Ines had unduly influenced Arlan “by mount[ing] a campaign to turn Bertha and Arlan against Bertha’s daughters.” Although the District Court found some of the probate commissioner’s assumptions unsupported by evidence, it reasoned these were harmless errors. Consequently, the District Court affirmed the probate commissioner’s recommendation.

Discussion

To establish undue influence in Nevada, “it must appear, either directly or by justifiable inference from the facts proved, that the influence . . . destroy[ed] the free agency of the testator.”² Further, “[a] presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction.”³ However, undue influence may also be shown in the absence of a presumption.⁴ The appropriate burden and quantum of proof required to establish undue influence in the absence of a presumption is an issue of first impression for this Court.

Burden and quantum of proof for establishing undue influence

A majority of other jurisdictions require undue influence be proved only by a preponderance of the evidence. Additionally, the Court has used a preponderance standard for proving undue influence in cases involving testamentary transfers. Consequently, “in the absence of a presumption, a will contestant must establish the existence of undue influence by a preponderance of the evidence.” To meet this standard, “the contestant must show that the disposition of property under the will was ‘more likely than not’ the result of undue influence.”⁵ This approach provides the best protections to vulnerable alleged donors because it makes it easier for will contestants to establish undue influence.

Substantial evidence did not support the district court’s order

Neither the probate court nor the district court identified the evidence that supported the probate commissioner’s finding of undue influence. “[T]he fact that Ines may have possessed influence does not amount to undue influence unless her influence destroyed Arlan’s free agency.” As there is no other evidence indicating Arlan changed his will due to any undue influence, the district court’s order affirming the probate court was not supported by substantial evidence.

Conclusion

The Court reversed the district court’s order invalidating the will as a product of undue influence because the respondents failed to meet the requisite burden of proof.

² In re Estate of Hegarty, 46 Nev 321, 326, 212 P. 1040, 1042 (1923).

³ In re Jane Tiffany Living Trust 2001, 124 Nev. 74, 78 177 P.3d 1060, 1062 (2008).

⁴ See generally *Hegarty*, 46 Nev. at 327, 212 P. at 1042.

⁵ See *Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 507 (Cal. 2001) (discussing the preponderance standard generally).